Loh Yoon Thong v Malaysian Institute of Accountants

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–92 OF 1999
FAIZA TAMBY CHIK J
21 SEPTEMBER 2000

Administrative Law *— Rules of natural justice — Breach of — Disciplinary Committee — Whether facts alleged against appellant for misconduct have been established — Appellant not informed of the ground of rules or procedure that governs the manner of hearing — Appellant not allowed attendance to hearing of investigation committee — Charge against appellant has not been established — Whether decision of Disciplinary Committee made in breach of rules of natural justice*

Civil Procedure *— Mode of commencement — Declaration, application for — Declaration that the decision of the Disciplinary Committee is null and void — Whether properly made by originating motion — Accountants Act 1967 s 21*

Civil Procedure *— Mode of commencement — Non compliance with procedure — Whether application commenced by wrong mode — Whether proccedings should have been commenced by way of notice of appeal and not by originating motion — Whether non compliance a mere irregularity — Accountants Act 1967 s 21 — Rules of the High Court 1980 O 2*

The appellant was a member of the respondent association and had been practising as an auditor and an accountant for 25 years. The appellant had been found guilty of a charge that he had withheld the audited accounts of PIE Healthcare Sdn Bhd ('the company') for the year ending 30 June 1995. The appellant filed an originating motion applying, inter alia, for an order that the decision of the Disciplinary Committee ('DC') be declared ultra vires and null and void and that the said decision be set aside. The appellant had taken it upon himself to inform the respondent during the DC hearing that the appellant as a 'gatekeeper of financial truths' had given a more than satisfactory explanation to justify his actions. Further, the set of accounts was not audited as yet for failure of the complainant to furnish information relating to 'post balance sheet date events'. The respondent raised a preliminary objection that the procedure that ought to have been adopted in the instant appeal under s 21 of the Accountant Act 1967 ('the Act') was to file a notice of appeal and not an originating motion.

Held, granting order in terms of the originating motion:

(1) There is no statutory definition that the respondent is a court of law. Therefore, the originating motion that was filed by the appellant was the correct procedure. The provisions of s 21(1) of the Act is only permissive in nature and not mandatory if a member is not happy with the decision of the DC of the respondent because of the word 'may' in the provision. Therefore, if there is any procedure which has not been complied with the appellant

can still make an application through this originating motion to set aside the respondent's decision (see pp 602E, 603C, F).

(2) Section 21(2) of the Act only covers the manner of hearing of the court proceeding in an appeal against the decision of the DC of the respondent. The sentence 'the procedure governing such appeals' in the provision is referring to or determining an appeal and not the manner in which the filing was made. Where the procedure on filing an appeal does not comply with the provision of the Act, the non-compliance if any, is only an irregularity and can be overcome by O 2 of the Rules of the High Court 1980 (see p 602H–I).

(3) The court found that there was no such accounts for the period ending 30 June 1995 as stated in the charge. The DC should have first decided whether the facts alleged in the charge had been proved beyond reasonable doubt and then whether on those facts the appellant was guilty of such conduct. The respondent had decided the case based on flimsy assumptions that never existed and thereby victimized the appellant without any basis whatsoever. The respondent accepted the mere allegations by the complainant *in toto* without even verifying the truth and validity of the facts by calling him to give evidence since the charge was serious. It was so glaring that the allegations in the complaint letter by the complainant were totally unfounded (see p 606D–E, 607G).

(4) The DC never informed the appellant of the ground rules or procedures that would govern the manner of the hearing. The appellant had an inalienable fundamental right to question the person who had complained against him. The DC's rejection of the appellant's right clearly was an attempt to dominate, suppress and intimidate the appellant. The conduct of the respondent could not be condoned at all (see p 608F, G–H).

(5) The failure of the investigation committee to allow the appellant's attendance at the session conducted by the committee amounted to a contravention of r 44(6) of the Accountant Rules 1972 ('the Rules'). It was for the appellant to decide whether he wished to attend to give further explanation and clarification to the investigation committee's session or not and it was certainly not for the said committee to decide so or on behalf of the appellant (see pp 609E, 610B).

(6) Besides the defective date of 30 June 1995 in the charge document against the appellant, another very evident and important defect was that the respondent's charges stated 'withheld the audited accounts'. At all material times there was no such statement of accounts that had been audited by the appellant. Thus the question of 'withheld audited accounts' did not exist at all. On the other hand, if the statement of accounts had not been completed or audited, then the question of 'withheld' could not arise at all.

Accordingly the appellant was accused of facts that were not only extremely dubious and errorneous but which did not exist at all. The respondent's decision had no basis and should be set aside (see p 622F–H).

(7) The charge against the appellant had not been established. The manner in which the DC of the respondent went about its inquiry was clearly against the rules of natural justice and therefore ultra vires and thus void (see p 624D).

[**Bahasa Malaysia summary**

Perayu adalah seorang ahli persatuan responden dan telah mengamal sebagai juruaudit dan seorang akauntan selama 25 tahun. Perayu telah didapati bersalah dalam pertuduhan bahawa beliau tidak mengemukakan akaun PIE Healthcare Sdn Bhd yang diauditkan ('syarikat tersebut') untuk tahun berakhir 30 Jun 1995. Perayu telah memfailkan saman pemula, memohon, antara lain, untuk suatu perintah bahawa keputusan jawatankuasa disiplin ('JD') diisytiharkan sebagai ultra vires dan batal serta tak sah dan keputusan tersebut diketepikan. Perayu telah memberitahu responden semasa perbicaraan JD bahawa perayu sebagai 'pengawal kebenaran kewangan' telah memberi penjelasan yang lebih daripada memuaskan untuk menjustifikasikan tindakan-tindakannya. Selanjutnya, set akaun-akaun tersebut belum lagi diauditkan oleh kerana kegagalan pengadu untuk mengemukakan maklumat berkenaan dengan 'selepas tempoh tarikh kunci kira-kira'. Responden telah membangkitkan bantahan awal bahawa prosedur yang patut diterima pakai di dalam rayuan ini di bawah s 21 Akta Akauntan 1967 ('Akta tersebut') adalah untuk memfailkan notis rayuan dan bukannya saman pemula.

Diputuskan, membenarkan perintah seperti yang dipohon dalam saman pemula tersebut:

(1) Tiada definasi statutori bahawa responden adalah suatu badan perundangan. Oleh itu, saman pemula yang difailkan oleh perayu adalah prosedur yang betul. Peruntukan s 21(1) Akta tersebut hanyalah bersifat membenarkan dan bukanlah mandatori jika seseorang ahli tidak puas hati dengan keputusan JD responden kerana perkataan 'mungkin' di dalam peruntukan. Oleh itu, jika terdapat sebarang prosedur yang belum dipatuhi, perayu masih boleh membuat permohonan melalui saman pemula untuk mengenepikan keputusan responden (lihat ms 602E, 603C, F).

(2) Seksyen 21(2) Akta tersebut hanya meliputi cara prosiding perbicaraan mahkamah di dalam suatu rayuan terhadap keputusan JD responden. Ayat 'prosedur yang mengawal rayuan-rayuan sedemikian' di dalam peruntukan adalah merujuk kepada menentukan suatu rayuan dan bukan cara di mana pemfailan

dibuat. Di mana suatu prosedur di dalam memfailkan rayuan tidak mematuhi peruntukan Akta, ketidakpatuhan, jika ada, hanyalah salah aturan dan boleh diatasi oleh A 2 Kaedah-kaedah Mahkamah Tinggi 1980 (lihat ms 602H–I).

(3) Mahkamah mendapati bahawa tidak terdapat akaun sedemikian bagi tempoh berakhir 30 Jun 1995 seperti yang dinyatakan di dalam pertuduhan. JD sepatutnya memutuskan dahulu sama ada fakta yang dikatakan di dalam pertuduhan telah dibuktikan melampaui keraguan munasabah dan kemudian sama ada di atas fakta-fakta tersebut perayu adalah bersalah untuk perbuatan sedemikian. Responden telah memutuskan kes tersebut berdasarkan andaian yang tidak kukuh yang tidak wujud dan dengan menjadikan perayu sebagai mangsa tanpa sebarang asas sekalipun. Responden telah menerima pengataan semata-mata oleh pengadu secara penuh tanpa mengesahkan kebenaran dan kesahan fakta-fakta dengan memanggilnya untuk memberikan keterangan oleh kerana pertuduhan adalah serius. Ia adalah begitu jelas bahawa pengataan-pengataan di dalam surat pengadu oleh pengadu tidak boleh disokong sepenuhnya (lihat ms 606D–E, 607G).

(4) JD tidak memberitahu perayu mengenai peraturan-peraturan atau prosedur-prosedur yang asas yang akan mengawal cara perbicaraan dijalankan. Perayu mempunyai hak asas yang tidak boleh dipisahkan untuk menyoal orang yang membuat aduan terhadapnya. Penolakan jawatankuasa displin akan hak dengan jelas merupakan suatu cubaan untuk mendominasikan, menekan dan memperkecilkan perayu. Tindakan responden tidak boleh dimaafkan langsung (lihat ms 608F, G–H).

(5) Kegagalan jawatankuasa siasatan untuk membenarkan kehadiran perayu di sesi yang dijalankan oleh jawatankuasa merupakan percanggahan k 44(6) Kaedah-kaedah Akauntan 1972 ('Kaedah-kaedah tersebut'). Ia adalah untuk perayu untuk memutuskan sama ada beliau ingin menghadiri untuk memberikan penerangan dan penjelasan yang selanjutnya kepada sesi siasatan jawatankuasa atau tidak dan ia sudah tentu bukan bagi jawatankuasa untuk memutuskan sedemikian atau memutuskan bagi pihak perayu (lihat ms 609E, 610B).

(6) Selain daripada tarikh yang defektif pada 30 Jun 1995 di dalam dokumen pertuduhan terhadap perayu, suatu lagi kecacatan yang jelas dan penting adalah bahawa pertuduhan responden menyatakan 'tidak mengemukakan akaun-akaun yang diauditkan'. Pada semua masa, tidak terdapat akaun-akaun yang sedemikian yang telah diaudit oleh perayu. Oleh itu persoalan 'tidak mengemukakan akaun-akaun yang diauditkan' tidak timbul langsung. Sebaliknya, jika kenyataan-kenyataan akaun belum diselesaikan atau diaudit, maka persoalan 'tidak mengemukakan' tidak terbangkit langsung. Dengan itu perayu telah dituduh untuk

fakta-fakta yang bukan sahaja disangsikan dan silap tetapi tidak wujud langsung. Keputusan responden tidak berdasar dan patut diketepikan (lihat ms 622F–H).

(7) Pertuduhan terhadap perayu belum lagi dibuktikan. Cara di mana JD responden menjalankan siasatannya adalah dengan jelas bercanggah dengan keadilan asasi dan dengan itu adalah ultra vires dan tak sah (lihat ms 624D).]

Notes

For cases on mode of commencement generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3123–3151.

For cases on breach of rules of natural justice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 569–576.

Cases referred to

Chong Ket Sui David v Datuk Chau Tet On [1993] 2 MLJ 509 (refd)
Dr Chua Kaw Bing v Majlis Perubatan Malaysia [1997] 5 MLJ 596 (refd)
Hong Kong Bank (M) Bhd v Nor Harizan bte Mohd All [1999] 5 MLJ 629 (refd)
Kok Seng Chong v Bukit Turf Club [1993] SLR 388 (refd)
Lai Cheng Cheong v Sowaratnam [1983] 2 MLJ 113 (refd)
Lee Soo Chuan v Lai Ah Yan & Anor [1972] 2 MLJ 33 (refd)
Lim Ko & Anor v Board of Architects [1965] 2 MLJ 203 (refd)
Nothman v Bamet London Borough Council [1978] 1 WLR 220 (refd)
R v Sussex Justices, ex parte Me Carthy [1924] 1 KB 256 (refd)
R Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 28 MLJ 169 (refd)
Re Lim Chor Pee [1991] 2 MLJ 154 (refd)
Rhina Bhar v Malaysian Bar [1994] 1 MLJ 24) (refd)
Sundaram v Chew Choo Khoon [1968] 2 MLJ 40 (refd)
The Matter of An Advocate & Solicitor [1978] 2 MLJ 7 (refd)
Wong Kok Chin v Singapore Society of Accountants [1990] 1 MLJ 456 (refd)
Woodworth & anor v Conroy & ors Conroy v Woodworth & anor [1976] 1 All ER 107 (refd)

Legislation referred to

Accountant Act 1967 s 21, (1), (2)
Accountants Rules 1972 rr 44, (b), (1), (6), (a)(ii), (b), 45(l)(c), (1), 47, (1), 49, 50, 55
Companies Act 1965 ss 174, (4), (5), (9), 274, 364(2)
Court of Judicature Act 1964 ss 3, 4
Interpretation Act 1967 s 3
Mining Enactment (FMS 147) s 96(i)

Rules of the High Court 1980 O 2, 55 rr 1, 2, 3, 4, 5, 6, 7, 8, 9, 10
Subordinate Court Rules 1980 O 49, r 2(6)

Chen Cheong Heng (*Chen & Co*) for the appellant.
T Kuhendran (*Zul Rafique & Partners*) for the respondent.

Faiza Tamby Chik J. : In this originating motion (encl 20), the appellant applied for an order, inter alia, that the decision of the disciplinary committee ('DC') be declared ultra vires and null and void, and the said decision be set aside. The originating motion is supported by an affidavit in support (encl 19), a supplemental affidavit (encl 21) and an affidavit in reply, all affirmed by the appellant. The respondent, through its representative, filed an affidavit in reply which was affirmed on 7 July 2000.

At the outset, let me dispose of the preliminary point raised by the respondent in that the procedure that ought to have been adopted in the instant appeal under s 21 of the Accountant Act 1967 ('the Act') was to file a notice of appeal and not an originating motion. It seems to me that there are doubts in the interpretation of the provision s 21(2) of the Act regarding the procedure for appeal against the decision of the respondent, the provision of s 21(2) of the Act reads as follows:

> 21 (2) the procedure governing such appeals to the High Court shall be the same as for appeals to the High Court from decisions of a Subordinate Court in civil matters

At the outset of the hearing on 14 September 2000, counsel for the respondent, Mr T Kuhendran, conceded that the respondent had a problem in resolving the issue of whether any appeal from their decisions should be by way of notice of appeal or by way of originating motion as this issue was never decided in Malaysia before insofar as the accounting profession is concerned. Reading the aforesaid provision literally, it looks as though it covers all matters pertaining to appeals including the way of filing as stated in O 49 of the Subordinate Court Rules 1980 ('the SCR') and O 55 rr 1–10 of the Rules of the High Court 1980 ('the RHC'). This means that the appellant in the instant case has to file Form 140. A deeper observation will reveal that Form 140 (Borang B) posed a lot of anomalies to the appellant. Amongst them are:

(a) The form is used to appeal against the decision of the magistrate or sessions court judge, and the form has to be filed with the registrar of the lower court. In this case there is no intitulement of the cause of action and who is the registrar, whereby Form 140 is to be filed thereat and to make the requisite payment fee. The parties to this suit are between the appellant and the respondent, which is a professional body and therefore O 49 SCR is not applicable.

(b) Is the DC of the respondent considered an inferior court as defined in s 3 of the Courts of Judicature Act 1964 {'CJA'). The answer is in the negative because the definition of 'subordinate court' in s 3 of the CJA only covers 'any inferior court from the decision of which, by reason of any written law there is a right of appeal to any High Court and

means in relation to any High Court any such court as by any written law has jurisdiction within the local jurisdiction of such High Court.'

(c) Section 4 of the CJA provides that where there is any conflict between any written laws and the CJA, except the Constitution, the CJA shall prevail. In other words, if s 21(2) of the Act conflicts with s 3 of the CJA insofar as the definition of 'inferior court' is concerned, the latter shall prevail.

(d) Where should Form 140 be filed? The respondent who is an interested party in this case cannot be the place where the Form should be filed. Further, O 49 r 2(6) of the RHC requires the appellant to serve a copy of the Form 140 on the respondent. So, is the respondent the proper place to file and to serve the aforesaid Form 140? I would say that it cannot be so.

In the case if *Sundaram v Chew Choo Khoon* [1968] 2 MLJ 40, Chang Min Tat J held that:

> a statutory body, though vested with judicial powers, is not a subordinate court within the meaning of s 3 of the Courts Ordinance, 1948. An appeal from the decision of such a statutory body is an origination and not a continuation of the judicial process.

I concur with the conclusion and reason expressed in that judgment. Therefore, I conclude that the originating motion that was filed by the appellant was the correct procedure. On the other hand, to interpret the provision of s 21(2) of the Act as covering the manner of filing will bring about an anomaly to the provision as logically, the appellant is unable to comply with it. In the case of *Hong Kong Bank (M) Bhd v Nor Harizan bte Mohd All* [1999] 5 MLJ 629 the Court at p 633 quoted the case of *Nothman v Bamet London Borough Council* [1978] 1 WLR 220 at p 228 with approval where it was said that:

> In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading in if necessary – so as to do what Parliament would have done, had they had the situation in mind'.

I am of the view that s 21(2) of the Act only covers the manner of hearing of the court proceeding ('hearing') in an appeal against the decision of the DC of the respondent. The sentence 'the procedure governing such appeals' in the provision is referring to or determining an appeal and not the manner in which the filing is made. This is so as there is no guideline in the provision of the Act as to how the hearing of an appeal should be conducted in this court. I am of the view that where the procedure on filing an appeal does not comply with the provision of the Act, the non-compliance, if any, is only an irregularity and can be overcome by O 2 of the RHC. Support of this proposition is to be found in the Federal Court case in *Lee Soo Chuan*

v Lai Ah Yan & Anor [1972] 2 MLJ 33. In that case, the Federal Court treated the originating motion as an appeal but it is to be stressed that s 96(i) of the Mining Enactment (FMS 147) provides that:

> every officer duly appointed to exercise the powers of Senior Inspector shall be vested by virtue of such appointment with the powers of a Magistrate of the First Class for the purpose of compelling the attendance of witnesses, of maintaining order in his court and otherwise of carrying into effect the provisions of this Enactment.

In a situation like the above, s 3 of the CJA is applicable and therefore, the filing should be done in the manner as provided under O 49 of the SCR. On the other hand, there is no statutory definition that the DC, the respondent, is a court of law, as in the case of *Lee Soo Chuan v Lai ah Yan & Anor* (1972) 2 MLJ 33. Therefore my view is that in the circumstances the appellant has complied with the provisions of the Act.

Further, the Federal Court in the case of *Lai Cheng Cheong v Sowaratnam* (1983) 2 MLJ 113 held that the court had jurisdiction to hear an application even though there was a venue of appeal. As an analogy, it was provided in s 77 of the Employment Ordinance 1955 that any party who was dissatisfied with the decision should appeal against the decision of the labour officer to the Minister of Labour. The Federal Court held that the existence of a remedy did not mean that the dissatisfied party could not make an application for certiorari against the decision of the labour officer without exhausting the channel of appeal. In the provisions of s 21(1) of the Act, it provides that:

> Any member aggrieved by any decision of the Disciplinary Committee may, within a period of twenty-one days after the decision has .been communicated to him, appeal to the High Court.

I am of the view that the above provision is only permissive in nature and not mandatory if a member is not happy with the decision of the DC of the respondent because of the word 'may' in the provision. Therefore, if there is any procedure which has not been complied with, the appellant can still make an application through this originating motion to set aside the respondent's decision on 13 August 1999 based on the case of *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113. By way of analogy, the legal profession (see *Rhina Bhar v Malaysian Bar* [1994] 1 MLJ 24), medical profession (see *Dr Chua Kaw Bing v Majlis Perubatan Malaysia* [1997] 5 MLJ 596) or architectural profession (see *Lim Ko & Anor v Board of Architects* [1965] 2 MLJ 203) uses the originating summons or originating motion to appeal against the decision of the Bar Council, Medical council or Board of Architect. *Halsbury's Law of Malaysia* (Vol 1) at para 10.2-032) and at para 10.11-011 provide the circumstances where an originating motion is used as the form for appeal. My view is that the accounting profession should be no different from the rest of the other professions as stated above.

This application (encl 20) is made in accordance with s 21 of the Act and it forms an appeal where the court has the jurisdiction to rehear the case

(see para 57 of *Halsbury Law of England*, 4th Ed, Vol 1(a)). The appellant is a member of the respondent association and has been practising as an auditor and an accountant for 25 years. In essence, the appellant was found guilty of a charge which reads as follows:

> That you, Loh Yoon Thong, of the firm of Messrs Loh Yoon Thong & Co had withheld the audited accounts of PIE Healthcare Sdn Bhd ('the company') for the year ending 30 June 1995 and in so doing, the said company was unable to file the same with the Registrar of Companies and the Inland Revenue Board, and you have thereby contravened and breached By-Laws 18-1 of the Institute's By-Laws (On Professional Conduct and Ethics) dealing with acts discreditable to the profession which states:
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> > 'Acts discreditable to the profession or 'unprofessional conduct' includes gross carelessness, neglect and incapacity in the performance of professional duties and impropriety in professional conduct.'
>
> And you have thereby contravened By-laws 18-1 of the Institute's By-laws (on Professional Conduct and Ethics) dealing with acts discreditable to the profession and committing an act amounting to 'unprofessional conduct' within the meaning as provided under r 43 of the Accountants Rules 1972.

In the adversarial system, a person is presumed innocent until proven guilty and it was imperative that the Investigation Committee ('IC') of the respondent, being the prosecutor of the case, to prove every ingredient of the charge against the appellant. It was not right to assume that the appellant was well aware of all the facts of the matter when the facts in the charge were poles apart from the truth of the matter. It was not for the appellant to disprove the particulars or facts in the charge and to prove his innocence. The fact is that the charge stated the withholding of a set of audited accounts for the year ending 30 June 1995. The IC had to prove that:

(a) an audited account for the year 30 June 1995 existed; and

(b) the appellant had withheld the said accounts;

These two ingredients were never proven because they did not exist in the first place. The respondent took a very simplistic approach (though the appellant's very livelihood was at stake) to assume that the appellant was aware of what he was charged with. The appellant had taken upon himself to inform the respondent during the DC hearing that even assuming that the charge was referring to a set of accounts for the year ending 31 December 1995, the appellant, as a 'gatekeeper of financial truths' had given a more than satisfactory explanation to justify his actions. Further, the set of accounts for the year ending 31 December 1995 was not audited as yet for failure of the complainant to furnish information relating to 'post balance sheet date events'. The question was where then was the withholding by the appellant? The right to be heard during the investigation by the IC is mandatory by virtue of r 44(6)(a)(ii) and r 44(b) of the Accountants Rule 1972 ('the Rules'). This right is not discretionary in nature but mandatory, more so when the livelihood of a person like the appellant was gravely at stake.

Rule 44(6)(a)(ii):a notice setting out any further particulars that may be necessary to disclose the reason for the investigation and inviting the member concerned, within such period (not being less than fourteen days) as may be specified in the notice, to give to the Registrar any written explanation he may wish to offer and to advise the Registrar if he wishes to be heard by the Investigation Committee; and

Rule 44(b): the Investigation Committee shall allow the time specified in the notice to elapse before commencing the investigation and shall give the member concerned reasonable opportunity to be heard if he so desires and shall give due consideration to any explanation he may make.

The words 'opportunity to be heard' in r 44(b) are consonant with the words in r 45(l)(c) which provides that 'notice that the member, if he wishes, will be given an opportunity to be heard, to examine or to cross-examine witnesses or to be accompanied by counsel'. Suffice to say that while the respondent was so rigid as to deny legal representation to the appellant when the charge against him was so serious, which could invite severe penalties under r 47 and thereby his livelihood was very much on the line, the respondent chose to interpret the word 'person' loosely to include 'corporation' when this interpretation was inconsistent with other provisions under the Rules, particularly r 55 where it specifically uses the words 'corporate or unincorporated' to differentiate from the word 'person'. Therefore s 3 of the Interpretation Act 1967 is only a general provision which becomes operative when the interpretation is not inconsistent with or repugnant to its application, as provided for in s 2(3)(b) of the same. By comparison, r 45(l)(c) of the Rules clearly provides that 'notice that the member, if he wishes, will be given an opportunity to be heard, to examine or to cross examine witnesses or to be accompanied by counsel. The above case of *Kok Seng Chong v Bukit Turf Club* [1993] SLR 388 at p 404 stated as follows:

> On the other hand, where a professional person is charged with a professional offence before a disciplinary tribunal with a view to investigating whether he should lose his right to practise his profession, few would wish to deny that person the right to have legal representation in view of:
>
> (a) the gravity of the charge;
>
> (b) the severity of the consequences of an adverse finding;
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> (c) the need for a more careful and thorough examination of the issues than would be the case for a golfing inquiry; and
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> (d) the likelihood of questions arising involving analysis of rules and reference to precedents (even in domestic tribunals uniformity and consistency are recognised virtues).

This sums up the position of legal representation afforded to the appellant which was plainly denied by the respondent albeit the livelihood of the

appellant was very much affected by the outcome of the decision. It is noted that the respondent did not give any clear guidance as to the burden and standard of proof. On the other hand, it deliberately beat about the bush without arriving at a clear and convincing explanation. Its 'explanation' in fact brought more confusion than clarification to the proceedings. Nowhere in the notes of proceedings is it stated that the appellant admitted withholding an audited set of accounts for the year ended 30 June 1995. It was very misleading in the respondent's submission to only refer to 'accounts'.

(1) What sort of 'accounts' did the learned counsel referred to? Was it merely accounts that were the task of an ordinary bookkeeper, which the appellant was not responsible for?

(2) Was it referring to accounts purported to be audited for the year ending 30 June 1995, which again was not the task of the appellant who was never instructed to carry out such works?

(3) Was it referring to accounts for the year ending 31 December 1995, which again was not audited for lack of information on 'events subsequent to post balance sheet date?

I am of the view that the respondent decided the case on flimsy assumptions that never existed and thereby victimized the appellant without any basis whatsoever. Worst of all, the respondent conveniently accepted the mere allegations by the complainant *in toto* without even verifying the truth and validity of the facts by calling him to give evidence since the charge was serious. It was so glaring that the allegations in the complaint letter by the complainant were totally unfounded. A perusal of the notes of proceedings (exh 'H' of encl 21), particularly from pp 27 (last paragraph) – 31 would reveal that the chairman of the tribunal entering the arena of the conflict by putting questions to the appellant. The chairman on p 32 (on para 5) even suggested that the date 30 June 1995 was an error and that the proceedings were conducted on the basis that the accounts referred to were for the year ending 31 December 1995. The Chairman had clearly overstepped his boundary when he tried to change or amend the allegations made by the complainant, which was supported by a statutory declaration (see encl 19, exh 'B' at pp 208–210). This was a classic case of bias and an attempt to victimize a member who tried to uphold the highest standards of professionalism in his chosen field. As to the merits of the case, suffice to state that instead of commending the appellant for the high standard he practised to protect the public by being the gatekeeper of financial truth in a company which denied him access to vital financial information relating to events subsequent to post balance sheet date, the respondent chose to take sides and penalized the appellant for something which he did not violate.

Rule 47 of the Rules provides that any person found guilty of any offence could be imposed with very serious punishment. Rule 47 (1) provides:

47 (1) The Disciplinary Committee shall at its discretion have power:
(a) subject to the provisions of para (2), to cause the name of the member of the Institute to be removed from the register and there upon such member shall cease to be a member of the Institute;
(b) Subject to the provisions of para (2), by writing under the hand of its Chairman, to suspend a member of the Institute for any period not exceeding five years;
(c) By writing under the hand of its Chairman, to impose a penalty upon the member of the Institute not exceeding five hundred Ringgit;
(d) By writing under the hand of its Chairman, to admonish censure or reprimand a member of the Institute:
(e) By writing under the hand of its Chairman, to order a member of the Institute to pay the Institute such sum as it deems fit in respect of costs and expenses of and incidental to any inquiry held by the Disciplinary Committee and any investigation held by the Investigation Committee; and
(f) By writing under the hand of its Chairman, to impose upon a member to attend upon a course of instruction approved by the Disciplinary committee for such period of time as the Committee deems fit.

By reading the provisions of the above r 47, it is evident that the punishments provided for are extremely serious and 'they certainly could detrimentally affect the 'livelihood' of a member such as the appellant in the instant case. Moreover, r 49 of the Rules provides that in the event that a person's membership is suspended, the said member ceases to be recognized as a member of the respondent during the period of suspension, and r 50 of the Rules provides that the immediate enforcement of the DC's decision, even though the affected member is appealing to the High Court, unless the High Court grants an order for stay. It is observed that in the notes of evidence attached to the appellant's affidavit that was affirmed on 8 May 2000, the appellant raised a preliminary objection concerning the charge. The charge contained the statement that the appellant had withheld the audited accounts for the year ending 30th June 1995. However, on perusal of the documents, it was found that there was no such annual accounts for the period ending on such a date. I would have thought the committee would first decide whether the facts alleged in the charge had been proved beyond reasonable doubt and then, whether on those facts, the appellant was guilty of such conduct. In the case of *Wong Kok Chin v Singapore Society of Accountants* [1990] 1 MLJ 456 at p 457, Yong Pung How J (as he then was) held:

> (12) The third charge itself was defective, in that it did not state the date at which it was alleged that the appellant knew or ought to have known the facts alleged. In a developing situation of the kind which arose here, it was necessary for the charge to state at least the date at which the facts were alleged to be known to the appellant.

In the case of *Re Lim Chor Pee* [1991] 2 MLJ 154 at p 162 Wee Chong Jin CJ stated:

> In taking on the burden of establishing this charge against the respondent, the Law Society does not have the benefit of the presumption found in s 96(2) of the Income Tax Act; it is therefore incumbent on the Law Society to adduce evidence to prove the charge. The burden is not on the respondent to prove that he had not evaded payment of tax on the fee of $85,000.

In the case of *The Matter of An Advocate & Solicitor* [1978] 2 MLJ 7, the court held:

> (2) the charge under s 84(2)(e) of the Legal Profession Act must be proved beyond reasonable doubt and in this case the evidence was insufficient to justify the Disciplinary Committee drawing the irresistible inference which led them to find that the respondent was guilty of the charge. Accordingly no order would be made on the application.

Therefore, it can be observed that the issues of burden and standard of proof became the focal point, and in the instant case during the preliminary stage of the hearing, it was observed that the DC avoided giving a clear and direct answer despite being asked profusely by the appellant. The question was how and on what basis they arrived at the decision. In the case of *Chong Ket Sui David v Datuk Chau Tet On* (1993) 2 MLJ 509 the High Court held:

> … While no particular number of witnesses shall in any case be required for proof of any fact, it was expected, however, that the defendants should call witnesses to offer evidence and elicit the truth. By failing to call witnesses the defendants have violated the principles of natural justice. Looking at the minutes of the meeting, and with no supporting evidence, the decision of the sub-committee was clearly perverse and devoid of plausible justification.

Adverting to the evidence adduced at the trial, it needs to be pointed out that the DC never informed the appellant of the ground rules or procedures that would govern the manner of the hearing. Bits and pieces of the ground rules or procedure were only given when requested personally by the appellant. Under such a state of ignorance as to the ground rules, and expecting that the complainant, being the key witness, would attend the hearing, the appellant informed the DC that he would like to cross examine the complainant who had made a statutory declaration in support of his complaint. The DC rejected his request, saying that the appellant had to give appropriate notice if he desired to do so. I think this was wholly without basis and was illogical. This was so because the appellant had an inalienable fundamental right to question the person who had complained against him as a professional. The question was whether the DC had acted way beyond the permissible lawful limits. This clearly was an attempt to dominate, suppress and intimidate the appellant. The conduct of the DC, in the instant case cannot be condoned at all. In the case of *R Surinder Singh Kanda v The Government of the Federation of Malaya*[1962] 28 MLJ 169 the Privy Council held:

> (2) the right to be heard carries with it the right of the accused to know the case made against him, the evidence given and the statements made affecting him; and he must be given a fair opportunity to correct or contradict them. The Judge or whoever has to adjudicate must not hear

evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. The court will not go into the likelihood of prejudice. The risk of it is enough. Applying these principles, applicant was not given a reasonable opportunity of being heard.

Halsbury's Laws of England 4th Ed, Vol 1 para 85 provides:

> … Prima facie, moreover, a duty to act in accordance with natural justice will arise in the exercise of a power to deprive a person of his livelihood or of his legal status where that status is not merely terminable at pleasure, or to deprive a person of liberty or property rights or another legitimate interest or expectation, or to impose a penalty on him; though the conferment of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation so to act. Where a discretionary power to encroach upon individual rights is exercised, factors to be taken into account in deciding what fairness requires in the exercise of the power include the nature of the interests to be affected, the circumstances in which the power falls to be exercised and the nature of the sanctions, if any, involved. The content of the duty to act fairly will normally be very limited where the authority is in the course of exercising a function not culminating in a binding decision, but that may not be the case if the wording of the grant of powers or the context indicates that a fair hearing ought to be extended to persons likely to be prejudicially affected by an investigation or recommendation.

The appellant also raised the issue of his not being given the opportunity to attend the session conducted by the respondent's investigation committee even though the appellant had specifically requested to be allowed to attend. The failure of the investigation committee to allow the appellant's attendance amounted to a contravention of r 44(6) of the Rules which reads as follows:

> 44(6) Before any investigation begins in respect of any matter—
> (a) the Registrar shall post or deliver to the member concerned—
> (i) copies of the written complaint (if any) and of all statutory declarations that have been made in support of the complaint;
> (ii) a notice setting out any further particulars that may be necessary to disclose the reason for the investigation and inviting the member concerned, within such period (not being less than fourteen days) as may be specified in the notice, to give to the Registrar any written explanation he may wish to offer and to advise the Registrar if he wishes to be heard by the Investigation Committee; and
> (b) the Investigation Committee shall allow the time specified in the notice to elapse before commencing the investigation and shall give the member concerned reasonable opportunity to be heard if he so desires and shall give due consideration to any explanation he may make.

The respondent's chairman, on the other hand, gave the meaning of the phrase 'if he so desires' contained in abovesaid r 44(6)(b) of the RHC that it gave the DC the discretion to determine whether attendance by the appellant was desirable or otherwise. The letter to the appellant conveying the decision reads:

> In respect of the request pursuant to the member's letter dated 13 April and 27 May 1999 that was submitted to the IC, the letter ended with 'should the need arise'. The IC was of the view that they are satisfied with the clarity of the written explanation given by the member dated 13 April 1999 and thus, was of the view that they do not need further clarification. Therefore, such need did not arise for him to appear before the IC.

I am of the opinion that the said interpretation by the respondent was erroneous for it was for the appellant to decide whether he wished to attend to give further explanation and clarification to the investigation committee's session or not, and it was certainly not for the said committee to decide so or on behalf of the appellant. When this issue was first raised by the appellant, the respondent's DC had no answer to it. Upon the order of the chairman of the DC during the hearing of the case, both the DC and the investigation committee conducted a private discussion on it in the absence of the appellant. The notes of hearing recorded thus:

> Chairman: Mr Loh could you retire for five minutes.
> Josephine: Shall I respond to this?
> Chairman: No, you shall not respond to this, could you (Loh Yoon Thong) retire for five minutes and you (Josephine) will respond to us in private.
> Josephine: Okay.

Why was the appellant being asked to leave when Josephine (who was a representative of the investigation committee) wished to say something on this issue? Why was it that Josephine's explanation had to be done in secret and not in the presence of the appellant? This act gravely prejudiced the appellant's interest. Given these events, it was only logical to conclude that there existed an ulterior intent on the part of the respondent to convict the appellant wrongfully. Paragraph 89 *Halsbury's Law of England* states that 'It is generally unnecessary to establish the presence of actual bias, although the courts are not precluded from entertaining such an allegation. It is enough to establish a real likelihood that in the circumstances of the case an adjudicator will be biased. Alternatively, it may be sufficient to establish that a reasonable person acquainted with the outward appearance of the situation would have reasonable grounds for suspecting bias.' The DC tried to rectify the wrongful action of the Investigation Committee which had breached the mandatory provision of r 44(6)(b) of the Rules by suggesting that the appellant should make the necessary arrangement with the investigation committee to appeal before it again. The chairman of the DC should not have made this suggestion. The chairman of the respondent's DC told the appellant that he was not allowed to be represented by counsel, but was only allowed to be accompanied by one. The chairman said that this was in accordance with the provision of r 45(1) of the Rules, which states thus:

> On receipt of any complaint from the Investigation Committee, the DC shall cause to be posted or delivered to the member concerned—
>
> (a) .....
>
> (b) .....

(c) notice that the member, if he wishes, will be given an opportunity to be heard, to examine or to cross examine witnesses or to be accompanied by counsel.

This provision enabled the appellant to examine or cross examine a witness. The question that had to be asked was whether the appellant who was not an advocate and solicitor had the ability to perform effectively this important task in defending himself against such a serious charge. Thus, the interpretation of the words 'accompanied by counsel' as to mean escorted by one was certainly too narrow a definition and was totally absurd. On the other hand, when enquired by the appellant on whether only a person and not a company (as in this case) could hold the right to submit a complaint as provided for under r 44 of the Rules, which reads:

(1) Any person who seeks to make a formal complaint that any member has done anything which renders the exercise of the powers of the Disciplinary Committee expedient shall make such complaint in the first instance to the Registrar. It shall be the duty of the Registrar to refer to such complaint to the Investigation.

(2) Every such complaint (other than a complaint made by the court) shall be in writing and shall be supported by such statutory declaration as the Investigation Committee may require from time to time.

It is observed that the chairman of the respondent's DC tried to defend the position of the complainant by saying that 'there is no misinterpretation in respect of the term 'any person' under r 44(1)'. This finding is pursuant to s 3 of the Interpretation Act 1948 and 1967 which interprets 'person' to include a body of persons, corporate or unincorporate. Thus, the registrar of the institute is under a duty to refer complaints from either a natural or an 'unnatural' person to the IC'. I am of the opinion that the abovesaid s 3 is a general provision and applies only if an Act is totally devoid of definitions. In the Act the word 'person' is not defined but this Act certainly differentiates the word 'person' from company. This can be seen in r 55 of the Rules, in particular r 5(g) which reads:

55 When the Disciplinary Committee exercises any of its disciplinary powers in respect of any member and its decision has taken effect, the Council—
(a) shall publish the decision of the Disciplinary Committee in the Gazette',
(b) shall publish such decision in an official publication of the Institute;
(c) shall publish such decision in such newspapers as the Council shall determine;
(d) shall publish such decision in any other publications as the Council shall determine;
(e) shall inform all relevant government licensing authorities of such decision;
(f) shall inform any other association of accounts to which such member is associated of such decision; and
(g) shall inform any other body, corporate or incorporate of such decision as the Council deems fit.

In para 1330 *Halsbury's Law of England* (4th Ed, Vol 9) it is clearly explained that 'A corporation is not included in the word 'person' when

used in a statute when the statute contains expressions that are repugnant to that construction'. This did not mean that a company cannot complain under the said Act, but that it had to be made through an individual person and not directly by the company as had happened in the instant case.

What is most surprising is the fact that the respondent made its decision without any evidence being adduced from the complainant, and without further investigation or verification with the appellant on the facts of the complaint, and without requiring the presence of the complainant to give evidence to support the said complaint, and during the hearing, taking over the task of prosecution. The respondent had accepted the complaint as proven and the hearing on 13 August 1999 was only a formality, for the DC had in fact arrived at a conclusion even before carrying out the said formality. This can be seen from the active role that was assumed by the chairman of the committee in discharging his duty not only as an adjudicator, but also the role of the investigation committee as prosecutor. This was clearly seen in the notes of evidence where the chairman attempted his best to seek out the appellant's weakness and giving judgment based on weaknesses that did not form the essence of the said charge. Paragraph 88 *Halsbury's Law of England* amongst others, states:

> Likelihood of bias may also arise because an adjudicator has already indicated partisanship by expressing opinions antagonistic or favourable to the parties before him, or has made known his views about the merits of the very issue or issues of a similar nature in such a way as to suggest prejudgment, or because he so actively associated with the institution or conduct of the proceedings before him, either in his personal capacity or by virtue of his membership of an interested organisation, as to make himself in substance, both judge and jury.

In *R v Sussex Justices, ex parte Me Carthy* [1924] 1 KB 256 at p 259, per Lord Hewart CJ said, 'it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. In the case of *Wong Kok Chin v Singapore Society of Accountants* [1990] 1 MLJ 456 the court held:

> The adversarial system of justice necessarily means, in the case of a disciplinary committee of a professional body, that it must approach the issues before it with an open mind. In hearing evidence, a disciplinary committee may seek clarification on points in the evidence which are not clear, but in doing so it must at all times avoid descending into the arena, and joining in the fray. An inescapable impression formed from perusing the transcript is that, in trying to discharge its responsibilities effectively, the committee went well beyond its authority to carry out a 'due inquiry' under the Act, until the inquiry became an inquisition of its own, aimed at securing evidence to justify a finding of guilt. The manner in which the committee went about its inquiry was clearly against the rules of natural justice and was therefore ultra vires, and on this ground alone any finding and sentence by it would have been void.

In the result, I hold that the charge against the appellant was defective.

It should be noted here that the primary reason the appellant could not release the statement of accounts ending 31 December 1965 ('The Report')

was because the appellant as an auditor failed to get the appropriate response from the complainant company, PIE Healthcare Sdn Bhd ('Complainant Company') on important information concerning 'events subsequent to balance sheet date' as provided for under s 174 Companies Act 1965 ('Companies Act') whereby the relevant provisions are as follows:

174 (2) An auditor shall, in a report under this section, state—
(a) whether the accounts and, if the company is a holding company for which consolidated accounts are prepared, the consolidated accounts are in his properly drawn up—
(i) so as to give a true and fair view of the matters required by s 169 to be dealt with in the accounts and if there are consolidated accounts, in the consolidated accounts: and
(iii) in accordance with the provisions of this Act so as to give a true and fair view of the company's affairs;
(b) ....
(c) ....
(d) Any defect or irregularity in the accounts or consolidated accounts and any matter not set out in the accounts or consolidated accounts without regard to which a true and fair view of the matters dealt with by the accounts or consolidated accounts would not be obtained; and
(e) if he is not satisfied as to any matters referred to in para (a), (b), or (c), his reasons for not being so satisfied.

(3) It is the duty of an auditor of a company to form an opinion as to each of the following matters:
(a) whether he has obtained all the information and explanation that he required;
(b) whether proper accounting and other records (including registers) have been kept by the company as required by this Act;
(c) whether the returns received from the branch offices of the company are adequate; and
(d) whether the procedures and methods used by a holding company or a subsidiary in arriving at the amount taken into any consolidated accounts were appropriate to the circumstances of the consolidation.

(4) An auditor of a company has a right of access at all reasonable time to the accounting and other records (including registers) of the company and any auditor of a related company such information and explanations as he desires for the purposes of audit.

(8) If an auditor, in the course of the performance of his duties as auditor of the company, is satisfied that—
(a) there has been a breach or non-observance of any of the provisions of the Act; and
(b) the circumstances are such that in his opinion the matter has not been or will not be adequately dealt with the comment in his report on the accounts or consolidated accounts or by bringing the matter to the notice of the directors of the company or, if the company is a subsidiary, of the directors of the holding company,

he shall forthwith report the matter in writing to the Registrar.

[Penalty: Imprisonment for two years or thirty thousand ringgit or both.]

It is noted that the appellant, orally during the hearing of the charge and by letter to the investigation committee, pointed out that there existed very important information, viz 'post balance sheet date events', that must be incorporated in the statement of annual account ending 31 December 1995, in particular information concerning the financial situation of the complainant company. At this juncture, it is necessary to provide a synopsis of background information on the appellant's relationship with the complainant company. Besides being auditor to the complainant company, the appellant was also a consultant to it, and it was in this relationship that the appellant became acquainted with information that would affect the financial situation of the complainant company. The information referred to is as follows:

(a) that the complainant company has suffered accumulated losses amounting to RM12m and RM11m for the years 1993–1994 respectively;

(b) that the accumulated losses for years 1995 and 1997 amounted to RM12.9m and RM19.6m respectively;

(c) that 70%–80% of the complainant company's sales, which comprised the sale of rubber gloves, depended wholly on a contract with a company known as America Health Products Corporation ('AHPC'), a company incorporated in the United States of America which contract was in force for three years from 1995;

(d) that 70–80% of the revenue of the complainant company depended on the abovesaid contract with AHPC:

(e) that there existed a serious competitor who was also producing rubber gloves, namely Wembly Rubber Products (M) Sdn Bhd ('Wembly'), and that this Wembly had taken over AHPC, and that there have been many attempts made by Wembly, being AHPC's holding company, to abort the sales agreement between the complainant company and AHPC;

(f) that if there was any cancellation of the abovesaid contract the complainant company would not be able to sustain its financial position;

(g) that conflicting statements or opinions on the above (e) and (f) had been given to the appellant within very short intervals;

(h) that other than the accumulated losses, the complainant company was also dependant on loans (hire purchase and lease financing included) from financial institutions amounting to RM26m;

(i) that any revocation of the abovesaid contract would have very detrimental effects not only on the financial position of the complainant company but also on its liability towards all its loans and financial commitments from financial institutions;

(j) that its shareholders' fund was completely depleted and was on a deficit by RM9.6m.

From the explanation above mentioned it is clear that the above information, particularly whether AHPC had revoked the sales contract with the complainant company formed 'events subsequent to the balance sheet date' and as such required in depth examination by the appellant as its auditor. Since becoming its auditor on 12 October 1996 and upon knowing the existence of the above crucial facts, the appellant had repeatedly asked (orally as well as written) about the said facts, but the complainant company had taken upon itself to determine what was to be examined and what was not. It was important to state here that the primary objective of the complainant company in using the said accounting report was to secure loans from financial institutions. What would happen if financial institutions or other pertinent parties, as for example distributors or parties having business dealings with the complainant company, were to depend upon incomplete or misrepresented financial statements for a decision? The appellant also explained to the respondent's DC concerning the two copies of statement of account for the period ending 31 December 1995 that were inadvertently signed and released to an agent of the complainant company at the appellant's office. The appellant had informed the respondent that out of the 14 copies of the uncompleted statement of accounts, he only (and accidentally) signed two copies and these two were released by appellant's employee without his knowledge. Under normal circumstances, if a statement of accounts was correct and proper, all copies would be released to the client. This can be seen from the statutory declarations made by an ex-employee and by another staff of the appellant's firm. It should be noted that the moment it came to the appellant's attention of the unauthorized release due to miscommunication, the appellant immediately requested for the return of both copies and also warned the complainant company not to utilize the same to raise loans or to do other related transactions. Unfortunately, the complainant company refused to comply. The refusal of the complainant company to cooperate with appellant in the above matter forced the appellant to serve a notice under s 174(4) of the Companies Act which states:

> 174 (4) An auditor of a company has a right of access at all reasonable time to the accounting and other records (including registers) of the company, and is entitled to require from any officer of the Company and any auditor or a related company such information and explanations as he desires for the purposes of audit.

The same was also reported to the Registrar of Companies on 20 March 1999 under s 174(5) and (9) of the Companies Act. Despite it all, the complainant company still refused to give access to the appellant and so, there was no appropriate action taken by the Registrar of Companies concerning the breach of the said law by the complainant company. In addition, in order to refuse the appellant its rights as an auditor, the complainant company acted to dismiss the appellant as its auditor on 28 March 1998. By dismissing the appellant as auditor, it appeared that the complainant company was able to hide whatever it wanted from the law. It should be remembered that without the appellant being also a 'consultant' who had the general knowledge of the operation of the

complainant company, issues like this would not have been brought forth. A

In order to have a better understanding of this instant case, I think it is quite instructive to know the responsibilities of the appellant as an auditor to the complainant company. Basic principles governing an audit which are mandatory for all members to observe are provided in the International Auditory Guideline. The said guideline describes the basic principles which govern the auditor's professional responsibilities and which should be complied with whenever an audit is carried out. The following paragraphs in the guideline are relevant. They are: B

5 The auditor should be straightforward, honest and sincere in his approach to his professional work. He must be fair and must not allow prejudice or bias to override his objectivity. He should maintain an impartial attitude and both be and appear to be free of any interest which might be regarded, whatever its actual effect, as being incompatible with integrity and objectivity. C

6 The auditor should respect the confidentiality of information acquired in the course of his work and should not disclose any such information to a third party without specific authority or unless there is a legal or professional duty to disclose. D

7 The audit should be performed and the report prepared with due professional care by persons who have adequate training, experience and competence in auditing.

15 The auditor should obtain sufficient appropriate audit evidence through the performance of compliance and substantive procedures to enable him to draw reasonable conclusions therefrom on which to base his opinion on the financial information. E

16 Compliance procedures are tests designed to obtain reasonable assurance that those internal controls on which audit reliance is to be placed are in effect. F

17 Substantive procedures are designed to obtain evidence as to the completeness, accuracy and validity of the data produced by the accounting system.

They are of two types:
- test of details of transactions and balances;
- analysis of significant ratios and trends including the resulting investigation of unusual fluctuations and items. G

21 The auditor should review and assess the conclusions drawn from the audit evidence obtained as the basis for the expression of his opinion on the financial information. This review and assessment involves forming an overall conclusion as to whether: H
(a) the financial information has been prepared using acceptable accounting policies, which have been consistently applied;
(b) the financial information complies with relevant regulations and statutory requirements;
(c) the view presented by the financial information as a whole is consistent with the auditor/s knowledge of the business of the entity; and I
(d) there is adequate disclosure of all material matters relevant to the proper presentation of the financial information.

22 The audit report should contain a clear written expression of opinion on the financial information. An unqualified opinion indicates the auditor's satisfaction in all material respects with the matters dealt with in para 21.

23 When a qualified opinion, adverse opinion or a disclaimer of opinion is given, the audit report should state in a clear and informative manner all of the reasons therefor.

1 International Auditing Guidelines 13, The Auditor's Report on Financial Statements, states (para 13):

> The report should be dated. This informs the reader that the auditor considered the effect on the financial statements and on his report of events or transactions about which he became aware that occurred up to that date.

4 The auditor should date and sign his report as of the date he completes his examination, which includes performing procedures relating to events occurring up to the date of his report. However, since his responsibility is to report on the financial statements as prepared and presented by management, the auditor should not date his report earlier than the date on which the financial statements are approved by management.

5 The auditor should obtain the assurance that the financial statements were approved by management, for example by obtaining a singed copy of the financial statements, or a representation to that effect.

6 The auditor is not expected to conduct a continuing review of all matters to which he has previously applied procedures and reached satisfactory conclusions. However, the auditor should perform procedures designed to satisfy himself that all subsequent events up to the date of his report that may require adjustment of or disclose in the financial statements have been identified. These procedures are in addition to specific procedures which may be applied to transactions occurring after the balance sheet date designed to obtain evidence as to account balances as at the balance sheet date, 'for example, the examination of data to ensure that transactions have been recorded in the proper period.

10 If the auditor becomes aware of events occurring after the date of the auditor's report but before the financial statements are issued, the auditor should consider whether the financial statement should be amended and should discuss the matter with management.

11 If management amends the financial statements, the auditor should carry out the procedures necessary in the circumstances and report on the amended financial statements. After carrying out such procedures, the auditor should date his report not earlier than the date the amended financial statements were approved and, accordingly, the procedures in paras 7–8 should be extended to the date of the auditor's report.

12 If management does not amend the financial statements in circumstances where the auditor believes they should be amended, his action will be determined by whether his report has been released to the client. If his report has not been released, the auditor should express a qualified opinion or an adverse opinion, as appropriate. If his report has been released to the client, the auditor should notify those persons ultimately responsible for the overall direction of the entity that he will take action to prevent future reliance on his report. The action taken will depend on the legal rights available to the auditor and the recommendations of his legal counsel.

15 If after the financial statements have been issued, the auditor becomes aware of a fact that materially affects the financial statements on which he has previously reported and which existed but was not known to him at the date of his report, he should discuss the matter with management.

16 The auditor should review the steps taken by management to ensure that any individuals in receipt of the previously issued financial statements together with the auditor's report thereon are informed that they have been superseded. If management decides that the financial statements should be revised, the auditor should carry out the procedures necessary in the circumstances and he should issue a new report on the revised financial statements. The auditor's report on the revised financial statements should have a new date and should refer in an explanatory paragraph to the note to the financial statements that more extensively discusses the reason for the revision to the previously issued financial statements. The report should also refer to the earlier report issued by the auditor on the financial statements and, when the auditor has restricted his subsequent examination to the events that necessitated the revision, should contain a statement to that effect.

17 If management does not take the steps referred to in para 16 the auditor should notify those persons ultimately responsible for the overall direction of the entity that he will take action to prevent future reliance on his report. The action taken will depend on the legal rights available to the auditor and the recommendations of his legal counsel.

18 It may not be necessary to revise the financial statements accompanied by the auditor's report when the issuance of financial statements for a later period is imminent, provided management agrees that appropriate disclosure will be made in such statements.

Section 364(2) of the Companies Act provides:

> Every person who is in any return report certificates balance sheet or other document required by or for the purposes of this Act makes or authorizes the making of a statement false or misleading in any material particular knowing it to be false or misleading or intentionally omits or authorizes the omission or accession of any matter or thing thereby making the document misleading in a material respect shall be guilty of offence against this Act.
>
> Penalty: Imprisonment for [ten years or two hundred and fifty thousand ringgit and fifty] or both.

Based on the provisions of the International Auditing Guidelines and also s 364(2) of the Companies Act, it is clear that any release of the accounting report for the year ending 31 December 1995 would entail a very adverse effect on the appellant for any breach of any one of the above provisions would not only form a basis for disciplinary action by the respondent which would adversely affect the livelihood of the appellant, but more seriously it would be an offence under the Companies Act which would invite a jail term and a fine of RM250,000. I would have thought the question to be asked by the respondent was, as a professional, should the appellant release the statement of accounts ending 31 December 1995 (not 30 June 1995 as written in the charge sheet) to the complainant company when the appellant was fully aware of facts concerning 'events subsequent to the balance sheet date' that had not been examined and incorporated into the said statement

of accounts. It is plain that releasing the accounts as suggested by the respondent in its decision would certainly bring calamity upon the appellant and would also subject the appellant to civil litigation by all third parties, such as financial institutions and customers, who have relied upon the said statement of accounts and have subsequently suffered losses because if such reliance, or someone who would have decided differently had all the relevant facts been incorporated into the statement of accounts, which was the appellant's responsibility as the auditor to do so. One of the principal 'reasons' (ground 6.4) on which the respondent found the appellant guilty of the charges against him was that the appellant had shifted his priority when the complainant company refused to settle the appellant's audit fees amounting to RM26,761.30 for the year ending 31 December 1995. But this was never the reason that caused the appellant not to sign all the statements of accounts for the year ending 31 December 1995 and releasing them to the complainant company, but it is observed that the most important reason was the refusal of the complainant company to co-operate with the appellant as auditor to examine the records and documents he asked for which related to 'events subsequent to the balance sheet date'. It is a most obvious fact that at all material times, the appellant, by telephonic communication and by many letters sent, had asked for co-operation from the complainant company to examine these documents related to the events. This certainly showed that the appellant still continued to give adequate attention to the complainant company, but it was the complainant company who refused to cooperate with him and soon after dismissed him as auditor. The respondent had attempted to define the word 'rearrange' contained in the appellant's letter to him dated 13 April 1999 out of context. The appellant had orally told the respondent's DC on 13 August 1999, besides also in writing, that if what had been explained by him was still considered not reasonable, he still had a lien on the said statement of accounts based on the By Laws (Professional Conduct and Ethics) which states that:

> 14-15 Notwithstanding para 14-14, where a legal right of lien exists, a member may exercise that lien in appropriate circumstances. A right of lien will only exist where all four of the following circumstances apply:
>
> (a) the document retained must be the property of the client who owes the money and not of a third party, no matter how closely connected with the client;
>
> (b) the documents must have come into possession of the member by proper means
>
> (c) work must have been done by the member upon the documents; and
>
> (d) the fees for which the lien is exercised must be outstanding in respect of such work and not in respect of the other unrelated work.
>
> 18-1 Acts discreditable to the profession or 'unprofessional conduct' includes gross carelessness, neglect and incapacity in the performance of professional duties and improprietary in professional conduct. A member shall not commit any acts discreditable to the profession which shall include but is not confined to the following acts:
>
> (a) Retention of clients' records after a demand is made from them is an act discreditable to the profession. Provided always that a member

may exercise his right of lien over such records in respect of unpaid fees legitimately due to him. A

(b) A member who wilfully makes or permits or directs another to make false and misleading entries in the financial statement or records of an entity shall be considered to have committed an act discreditable to the profession.

(c) A member who knowingly in any manner advises any of his clients in any scheme whereby his client may evade tax is committing an act discreditable to the profession. B

(d) A member who wilfully and with the intention to defraud:

(iii) issues any cheque; or

(iv) becomes a party to the issuance of any cheques.

which is dishonoured upon presentation due to lack of funds or any other reason is committing an act discreditable to the profession. C

The English Court of Appeal in the case of *Woodworth & anor v Conroy & ors Conroy v Woodworth & anor* [1976] 1 All ER 107 held:

(i) Accountants were entitled to a particular lien for unpaid fees over any books of account, files and papers which had been delivered to them in the course of their ordinary professional work by their clients and also over any documents which had come into their possession whilst acting as their clients' agents in the course of their ordinary professional work (see p 110 h and j and p 112 h, post). D

E

Lawton LJ said at p 110 said:

> I would adjudge that accountants in the course of doing their ordinary professional work of producing and auditing accounts, advising on financial problems, and carrying on negotiations with the Inland Revenue in relation to both taxation and rating have at least a particular lien over any books of account, files and papers which their clients delivered to them and also over any documents which have come into their possession in the course of acting as their clients' agents in the course of their ordinary professional work. Accountants may enjoy a wider lien that this; but I find it unnecessary for the purposes of this appeal to say more than I have. F

It must be noted that the appellant's firm is not a charitable organization but is an entity whose 'livelihood' depended upon giving services and being paid for remuneration or 'professional fees'. If a client refuses to settle its overdue fees, it is only fair that an auditor would give more attention to another client who is willing to pay so that his firm can continue to operate. It is all too easy for the respondent's DC which conducted the hearing of the charges against the appellant to decide that fees were not important at all, but what was important was to release the relevant statement of accounts to the complainant company under all circumstances. It is observed that even though this was never the appellant's reason at all, the respondent nevertheless was trying to find fault with the appellant and attacked him based on that allegation. In their grounds of decision (viz 6.2) the respondent also stated that as a director in a company providing consultancy services, the appellant, who had close relationship with the complainant company, should have prepared a qualified statement of G H I

accounts by stating his opinion and reservation concerning events subsequent to the balance sheet date and released it to the complainant company. However, this decision by the respondent was overly simplistic based on the following reasons:

(a) the complainant company had stated that the reason for getting the statement of accounts was for purposes related to financial institutions and commercial purposes. If the said statement of accounts contained qualifications that the said company refused the appellant access, would the complainant company be prepared and willing to approve and sign it and still be able to achieve its purposes at the same time?;

(b) at all material times, the appellant had repeatedly asked for for the cooperation from the complainant company to allow him access to examine documents relating to 'events subsequent to the balance sheet date' and in addition, had given notice under s 274 Companies Act which provides for the right of an auditor to have access to all the information in the performance of his duty as an auditor;

(c) at all material times, as a result of their close relationship, the appellant did not realize that he would not be getting co-operation form the complainant company, and he also had no opportunity to give an audited qualified statement of accounts when the complainant company, without giving any notice, took drastic action in the form of dismissing the appellant as auditor on 27 March 1998. The appellant then had no alternative but to report to the Registrar of Companies;

(d) the appellant, at the request of the complainant company, was only prepared to give a 'draft' or an 'unaudited' statement of accounts and this was confirmed by directors of the complainant company. If the appellant were to give a statement of accounts which was 'qualified' he could not incorporate the 'qualifications' in the 'draft' or 'unaudited' statement of accounts that were already approved and signed by the directors of the complainant company because this would be tantamount to 'forgery', but what the appellant had to do was to prepare a new set of 'draft' statement of accounts that contained 'qualifications'. However, as noted before he could do so, the appellant was dismissed as the auditor. The technical phrase 'qualified audit reports' in all situations means that a statement of accounts can only be 'qualified' after the appellant as auditor has examined all accounting aspects in his audit, which includes 'events subsequent to the balance sheet date'. This can be clearly seen in the International Auditing Guidelines, that is events after the date of the auditor's report but before the financial statements are issued and discovery of facts after financial statements have been issued. In this instant case, the statement of accounts for the year ending 31 December 1995 had not been dated and signed in the technical sense, thus the issue of 'qualified audit reports' did not arise at all. The rules governing in this instance are as follows:

(i) Dating of the auditor's report:

The auditor should date and sign his report as of the date he completes his examination, which includes performing procedures relating to events occurring up to the date of his report. However, since his responsibility is to report on the financial statements as prepared and presented by the management, the auditor should not date his report earlier than the date on which the financial statements are approved by the management. The auditor should obtain the assurance that the management approved the financial statements, for example by obtaining a signed copy of the financial statement, or a representation to that effect.

(ii) Events up to the date of the auditor's report

Therefore, it is clear that the issue of 'qualified audit reports' cannot exist at all for the reason that the statement of account for the year ending 31 December 1995 was not ready. The appellant had exhibited a 'management representation' letter that was signed by a director of the complainant company but without a date on top. This meant that the said report was not yet ready because it was the practice of the appellant's firm that he would sign such a report while also putting a date on the 'management representation' letter, as is required by the International Auditing Guidelines. Thus, the respondent's reasoning in his decision (reason 6.2) was without any basis at all.

Besides the defective date of 30 June 1995 in the charge document against the appellant, another very evident and important defect was that the respondent's charges state 'withheld the audited accounts'. A very important question to ask was had the said accounts been audited? The answer was that at all material times, there was no such statement of accounts that had been audited by the appellant. Thus, the question of 'withheld audited accounts' did not exist at all. On the other hand, if the statement of accounts had not been completed or audited, then the question of 'withheld' could not arise at all. Accordingly, the appellant was accused of facts that were not only extremely dubious and erroneous but which did not exist at all. The most incredible thing was that the respondent was of the opinion that the appellant was guilty of such an accusation. Consequently, the reasons in the respondent's decision on 13 August 1999 had no basis and should be set aside. On the inaccuracy contained in the complainant company's complaint dated 6 February 1999 (the 'said complaint') it was supported by a statutory declaration sworn by a director of the complainant company on the same day. This meant that whatever was contained in the said complaint was all correct and in the full knowledge of that director. However, it was submitted that there existed many facts which were confusing and even false contained in the said complaint. There were:

(a) The first paragraph stated the account for the year ending on 30 June 1998, whereas the appellant was never instructed to audit a set of accounts ending on 30 June but a set of accounts ending on 31 December every year. Further, how could the appellant prepare the account for the year ending 30 June 1998 when he was already dismissed as auditor on 28 March 1998?

(b) The paragraph numbered (1) said that the date of the statement of accounts was 30 June 1995, but such a set of accounts dated that date never existed

(c) The paragraph numbered (4) said that the appellant had never informed the complainant company that he wanted to review the 'post balance sheet date events'. It is observed that the truth was not only did the appellant's firm contact the complainant company by telephone numerous times but also sent reminders and put them on notice under s 174 Companies Act.

(d) The paragraph numbered (5) said that Loh Yoon Thong & Co ('LYT & Co') was also the tax agent for them. This was certainly false because at all material times, a service company by the name of FB Management Consultants Sdn Bhd was the tax agent for them.

In other words, the complainant of the said complaint, which was supported by a statutory declaration of a director of the complainant company, had committed the offence of perjury for desposing false allegations. And that even though the respondent was aware of the falsehood of the said complaint, they nevertheless proceeded with the decision to find the appellant guilty and penalized him. There was a high probability that by imputing guilt and imposing a penalty on the appellant, they would enable another accounting firm to assume the auditor's position for the complainant company, for without which the new firm would be committing an offence under the By Law (On Professional Conduct and Ethics) on Fundamental Principles. In the Singapore case of *Wong Kok Chin v Singapore Society of Accountants*[1990] 1 MLJ 456, Yong Pung How J (as he then was) held:

> **Held**, allowing the appellant's appeal on all the charges:
>
> (1) The terms 'grave impropriety', 'gross neglect', and 'discreditable act' are not defined in the Act and there has also been no judicial interpretation of these terms. Neither has the society issued for the benefit of its members any rules or guidelines as to what acts of default or misconduct would be considered by the society to fall within the scope of this section. The court must therefore determine for itself what acts or omissions amounted to professional misconduct which fell within the ranges of offences set out in the section, and whether, on a review of the evidence, the appellant was guilty of any of them. An act or default which was discreditable to an accountant need not necessarily have arisen out of his professional work as an accountant, but it should nevertheless have been an act which would have brought discredit on him as an accountant or on the profession as a whole.

(2) A practical test could have been if reasonable people, on hearing about what he had done, would have said without hesitation that as an accountant the should not have done it. The court was of the opinion that a member of the society would have been guilty of gross neglect in the performance of his professional duties if, having regard to all the surrounding circumstances at the time, he did not exercise the skill and care that a reasonable client would have been entitled to expect of him.

(3) For any member of the society to be guilty of grave impropriety in a professional respect under s 34, there must have been the same element of moral turpitude in the misconduct complained of, to the extent that it would have been regarded without hesitation by other accountants as being so disgraceful that his continued membership of the profession would immediately be called into question.

(4) In view of the seriousness of the allegation, the committee carrying out the inquiry would have to apply a high standard of proof and not arrive at a finding of guilt merely on a balance of probabilities.

I allow this appeal and give judgment for the appellant. The charge has not been established. I am of the opinion that (to borrow the words expressed by Yong Pung How J (as he then was) in the case of *Wong Kok Chin*) the manner in which the DC of the respondent went about its inquiry was clearly against the rules of natural justice and therefore ultra vires. It follows therefore that the finding of the DC of the respondent is hereby void and set aside. Order in terms of the originating motion (encl 20) is hereby granted.

Order in terms of the originating summons granted.

Reported by Jafisah Jaafar